IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 7366

CANADIAN PACIFIC RAILWAY COMPANY,
a foreign corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States
For the Western District of Washington,
Northern Division.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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BRIEF PRINTING COMPANY

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STATEMENT OF THE CASE

The original action was instituted in the District Court of the United States for the Western District of Washington, Northern Division, for the purpose

of enforcing the payment by the present appellant corporation of the sum of four thousand, three hundred and thirty-one dollars and thirteen cents ($4331.13) for "overtime" services rendered by inspectors and employees of the United States Immigration Service in connection with the examination and landing of passengers and crews of the said corporation's steamships, from May 3, 1931, to September 30, 1932, inclusive. Prior to the trial, the sum of $86.33 was paid by the said corporation for such "overtime" services as had been performed by said inspectors and employees in connection with the inspection of certain of its steamships which were not running on regular schedules. No question was raised as to the accuracy of the account (pp. 5-57, Transcript), but the said corporation disclaimed liability for any other part of same on the ground that the other steamships involved were operated on regular schedules and were carrying passengers and automobiles as international ferries, and that, for that reason, it and the said steamships were exempt from such "overtime" charges. The District Court held that the steamers in question were not "international ferries" and rendered judgment in favor of the plaintiff for $4244.80, the full amount claimed. The case now comes before this court on appeal from the said judgment.

ARGUMENT

Action was brought under the Act approved March 2, 1931 (c.368, secs. 1 and 2, 46 Stat. 1467; 8 USCA, Secs. 109a and 109b), entitled: "An act To provide extra compensation for overtime service performed by immigrant inspectors and other employees of the Immigration Service", which reads as follows:

> "The Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours

in said ports, but nothing contained in this Section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed."

Sec. 2. "The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in this Act. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided*, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules."

Department of Labor General Order No. 175, issued April 27, 1931, under authority of the foregoing Act (Defendant's Exhibit 12) provides as follows:

"(a) Overtime shall be understood to mean time on duty in addition to the number of hours fixed administratively as the regular work day of inspectors and employees. To constitute overtime for the purpose of the foregoing Act there must exist two factors, to wit, (1) time on duty

in addition to the number of hours fixed administratively as the regular work day of inspectors and employees, and (2) time on duty for at least one hour between 5 p.m. and 8 a.m. on any day."

"(b) No distinction is to be made between week days, Sundays and holidays so far as employment between the hours of 5 p.m. and 8 a.m. is concerned."

* * * *

"(d) For duties performed on Sundays and holidays between the hours of 8 a.m. and 5 p.m. employees shall be entitled to two days' pay in excess of their regular pay. The term "holiday" shall include only national holidays, viz.: January 1, February 22, May 30, July 4, the first Monday in September, Thanksgiving Day (when designated by the President), December 25, and such other days as may be made national holidays by Act of Congress."

"(e) For each two hours or fraction thereof of at least one hour that such duties are performed in excess of the regular shift of duty between 5 p.m. of any day and 8 a.m. of the following day, employees shall be entitled to one half day's pay in excess of his regular pay. Where in any unit of time beginning at 5 p.m. and ending at the following 8 a.m. such duties are performed in broken periods and less than two hours intervene between such periods they shall be combined, otherwise each period of such unit shall be considered separately. The maximum amount which shall be paid to any em-

ployee for the purpose of such duties between 5 p.m. and the following 8 a.m. shall not exceed two and one-half days' pay in excess of the regular pay. After that amount is earned no further compensation can be paid for any services up to 8 a.m. of the same inspector or employee."

"(f) This order shall likewise apply to the time on duty after reporting for duty pursuant to order to do so and regardless of whether or not actual inspection or examination of passengers or crews takes place in those cases in which the government is not liable for the overtime."

"(g) For the purpose of this order, a day's pay in the case of inspectors or employees receiving compensation per annum shall be one three hundred and sixtieth of the regular annual salary, and in the case of inspectors and employees receiving compensation per month shall be one-thirtieth of the regular monthly salary."

* * * *

"(i) The customary working hours of inspectors and employees engaged in the examination and landing of passengers and crews shall be, as far as practicable, within the time between 8 a.m. and 5 p.m."

"(j) Liability for payment of overtime compensation shall not apply to the examination and inspection of passengers at designated ports of entry arriving on or by international ferries, bridges, tunnels, aircraft, railroad trains or ves-

sels on the Great Lakes and connecting waterways, when operating on regular schedules filed with the immigration officer in charge at such designated port of entry. Examination and inspection at such designated ports of entry shall mean such examination and inspection actually performed at the record port of entry. Overtime compensation for which the government is not liable shall be prorated among the various vessels and conveyances according to the aggregate of the total overtime of each inspector and employee in connection with the examination and inspection between 8 a.m. and 5 p.m. on Sundays and holidays, of the crew of each vessel or conveyance concerned, and also of the passengers on such vessel or conveyance, unless under this paragraph there is no liability with respect to inspection and examination of passengers. Such liability for overtime on all days between 5 p.m. and 8 a.m. is to be prorated in the same manner."

"(k) Payment on the part of vessels or other conveyances of overtime compensation shall be made by postal money order or certified check (including any charge for collection or exchange) payable to the Disbursing Clerk, Department of Labor, and forwarded to the Commissioner General of Immigration. Payment by the Disbursing Officer of the Department to the inspector or employee concerned of extra compensation for which the master, owner, agent, or consignee is liable can be made to the extent only that collection is made from such master, owner, agent, or consignee and received by the Disbursing Clerk, Department of Labor."

* * * *

"(n) Commissioners and District Directors of Immigration will arrange schedules and working hours of inspectors and employees of the Immigration Service so as to avoid overtime within this order, as far as possible consistent with the enforcement of the immigration laws and the convenience of persons arriving in the United States, and also as far as practicable cause any overtime work within the terms of this order to be equally alternated among the inspectors and employees engaged at the same port in the inspection and examination of arriving passengers and crews."

The provisions of the foregoing statute and General Order are practically identical with the laws providing for and governing "overtime" pay for officers of the U. S. Customs Service (Act of February 13, 1911, sec. 5, 36 Stat. 901, as amended by the Act of February 7, 1920, 41 Stat. 402, Comp. Stat. Ann. Supp. 1923, sec. 5571, and Tariff Act of September 21, 1922, 42 Stat. 858). The only difference material to this cause is that the requirement of payment for overtime services to immigration inspectors and other employees does not apply to inspection and examination at designated ports of entry of passengers arriving at such ports via international ferries.

The requirement of payment to officers of the

Customs Service for overtime work has been upheld by the courts on various occasions, notably:

Port Huron & Sarnia Ferry Co. v. Lawson, (D. C. Mich. August 6, 1923), 292 F. 216;

Mellon v. Minneapolis, St. P. & S. S. M. Ry. Co. (Court of Appeals District of Columbia, Feb. 1, 1926), 11 F. (2d) 332.

Ferguson v. Port Huron & Sarnia Ferry Co. (D. C. Mich. June 4, 1926), 13 F (2d) 489.

For many years, the appellant corporation has been paying for overtime work by the officers of the said Service at the port of Seattle and, during the period involved in the present case, it was paying for such work performed by the said officers in connection with the arrival of the same steamers for the inspection, examination and landing of the passengers and crews of which it refused to pay the officers of the Immigration Service.

It was the duty of the immigration officers to examine and inspect the passengers and crews of the steamers in question upon their arrival at the port of Seattle (Section 15, Act of February 5, 1917, 8 USCA, Sec. 151), and that, regardless of the fact that there may have been pre-examination

of said passengers in Canada prior to their embarkation for said port (General Order No. 133, Department of Labor, May 4, 1929). It also was proper that the passengers and crews of the said steamers should be examined by two immigrant inspectors (Section 16, Act of February 5, 1917, 8 USCA, Sec 152).

In view of the foregoing, the only point at issue is whether or not, in holding that the appellant corporation was not operating the steamers in question as "*ferry-boats*" *of an* "*international ferry*", the District Court misconstrued the law.

Webster's New International Dictionary (1923 edition) defines a "ferry" as: (1) "A place of crossing"; (2) "A place or passage where persons or things are carried across a river, arm of the sea, etc. in a boat"; (3) "A vessel in which passengers and goods are conveyed over narrow waters"; (4) "A franchise or right to carry passengers or goods, or both, from shore to shore across a river, channel or narrow body of water, charging tolls"; also as: "A continuation of the highway and under the same general control". It also defines a "ferry-boat" as: "A vessel for conveying passengers, merchandise, etc. across a river or other narrow water."

Other definitions of, and requirements for the establishment and maintenance of, ferries are as follows:

> "A ferry is the right of carrying passengers across streams or bodies of water or arms of the sea from one point to another for a compensation by way of a toll. *New York v. Starin*, 8 N.Y. St. Rep. 655, 659."

> "Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire."

> "A ferry, in a general sense, is a highway over narrow waters, and is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers, with their teams and vehicles, and such other property as they may carry or have with them."

> "A ferry, says Dane (Vol. 2, p. 683) forms a part of a public passage or highway where rivers or waters are to be passed in boats."

> *Words and Phrases*, Vol. 3, p. 2749.

> "The essential element in a ferry is the transportation over intervening water—a crossing from shore to shore at points conveniently opposite, and forming connection with thoroughfares at each terminus. A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be 'a liberty to have a boat for passage

upon a river for the carriage of horses and men for a reasonable toll', adding, 'It is usually to cross a large river.' It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water; the essential idea of passing *from one shore to an opposite shore* being retained." (Italics ours).

Words and Phrases, Vol. 3, pp. 2749, 2750.

"A ferry is a franchise granted by the State and regulated by statute. It may be defined as a right to transport persons and property across a water course and land within the jurisdiction granting the franchise, and to receive tolls or pay therefor." *Einstman v. Black*, 14 Ill. App. 381, 383, 384; *Words and Phrases*, Vol 3, p. 2750.

"* * * A ferry franchise is property and an incorporeal hereditament."

Words and Phrases, Vol 3, p. 2751.

"Ferries — that is, rights of carrying passengers across streams or bodies of water or arms of the sea, from one point to another for a compensation paid by way of a toll — are by common law deemed to be franchises, and cannot, in England, be set up without the King's license, and in this country without a grant of the legislature, as representing the sovereign power." *City of New York v. Starin*, 12 N. E. 631, 632; 106 N. Y. 1; *Words and Phrases*, Vol. 3, p. 2751.

A ferry necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. *Port Richmond Ferry Co. v. Freeholders of Hudson County*, 234 U. S. 317.

"A ferry license is a privilege of highway, and the right to grant such a franchise belongs to the State. It may be granted or withheld, and the right to prohibit undoubtedly carries with it the right to impose conditions." *State v. Sickmann*, 65 Mo. App. 499, 501; *Words and Phrases*, Vol. 3, p. 2751.

"The essential element in a ferry franchise is the exclusive right to transport persons and horses, and vehicles with which they travel, as well as such personal goods as accompany them, from one shore to the other, over the intervening water, for the toll." *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633; *Words and Phrases*, Vol. 3, p. 2752.

"The grant of a ferry franchise necessarily implies a right to exercise exclusive privileges within prescribed limits, and on certain conditions."

Words and Phrases, Vol. 3, p. 2752.

"A ferry is a liberty to have a boat upon a stream, river, arm of the sea, lake, or other body of water, for the transportation of men, horses, and vehicles with their contents, for a reasonable toll. The term is also used to designate the place where the right is exercised, and

sometimes as limited to the landing place. Ferries are frequently referred to or regarded as public highways, being continuations of the highways with which they connect, and serving the purpose of a bridge where a bridge is impracticable. But the terms 'ferry' and 'bridge' are not ordinarily capable of use as synonymous terms, and it has been denied that ferries are highways in a strict sense. There are some authorities holding it to be essential that a public ferry must be in continuation of a public highway. The limits of the ferry proper are the high water mark at either terminus. There is nothing in the nature of a ferry which requires that it should be operated from but one place on one shore to a single point on the opposite shore; nor is there any particular limit to the distance over which it may be operated, *provided only the intervening waters are not wide and can be traversed at regular and brief intervals by boats adapted to a ferry business* * * *"

"Private and public ferries distinguished—

"A distinction is made between private ferries, which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the State and must be based upon grant, license, or prescription." (Italics ours) 25 *C. J.* 1048-1050.

The term "ferry" does not apply to a line of steamboats from Albany to New York. "To speak of a ferry from New York to Albany is as great an abuse of terms as to talk of a ferry from New

Orleans to St. Louis or Pittsburg, and even from New York to Liverpool." *North River Steamboat Co. v. Livingston,* 3 Cow. (N. Y.), 713, 748; 3 Wheel. Cr. 483; 25 *C. J.* 1050.

"The right to establish and maintain a public ferry is a franchise which cannot be exercised without consent of the State, and no person, although he may own the land on both sides of a stream, may establish such a ferry unless authorized to do so by the proper public authority." 25 *C. J.* 1051.

"In the United States the power of granting ferry franchises is vested in the legislative authority of the States. It never has been exercised by the federal government." 25 *C. J.* 1052.

"This power has, in many States, been delegated to certain inferior bodies by general acts of the legislatures." 25 *C. J.* 1053.

"The States * * * have authority to establish ferries upon waters forming a boundry * * * between a state and a foreign country." 25 *C. J.* 1055.

"The State may, through the proper authorities, require the payment of a license fee from ferries operating within its jurisdiction * * * and fix the rates of ferriage * * *." 25 *C. J.* 1073.

The steamers for the examination and inspection

of the passengers and crews of which the "overtime" pay is sought by the immigration officers, are the "Princess Kathleen", "Princess Marguerite", "Princess Louise", "Princess Charlotte", and "Princess Adelaide". Their descriptions, according to the appellant corporation's advertising folders, are as follows:

	Gross Tonnage	Passenger Capacity	No. of Beds	No. of State-rooms	Dining-room Capacity
Princess Kathleen	5875	1500	290	136	166
Princess Marguerite	5875	1500	290	136	166
Princess Louise	4200	1200	262	132	129
Princess Charlotte	3924	1200	230	118	118
Princess Adelaide	3060	1200	206	103	84

All of the above are constructed on the general lines of regular deep-sea steamships and bear no resemblance whatever to the ordinary type of "ferry-boat". All are equipped with wireless apparatus and carry wireless operators, and it is understood that all except the "Princess Louise" were built in Scotland and crossed the Atlantic ocean under their own power, and also came up the Pacific ocean to Vancouver, B. C. before being placed on the route between that city and Seattle. It also is well known that, when not running between said ports, they frequently have run on other routes of the appellant

corporation, and that some of them, if not all, have made trips to Alaska on various occasions. As shown above, all have spacious dining-rooms and sleeping accomodations for hundreds of passengers. They are referred to in the appellant corporation's advertising matter as "*Princess Liners*", and are classified by the United States Steamboat Inspection Service as "*Foreign Passenger Steamers*" (Plaintiff's Exhibit G). Those which arrive at Seattle in the evening leave Vancouver, B. C. in the forenoon, go from there to Victoria, B. C., a distance of 85 *miles*, remain in Victoria from one to one and one half hours, and then proceed to Seattle, a distance of 81 *miles*, arriving at the said port at 9 p.m. or thereabouts. Those arriving at Seattle, at, or about, 7:30 a.m., as a general rule, go direct from Vancouver, a distance of approximately 145 *miles*. They leave Vancouver at, or about, 11 p.m. The distance from Vancouver direct to Seattle is almost exactly the same as that from New York to Albany, the absurdity of speaking of a "ferry" between which cities was stated by the Court in *North River Steamboat Co. v. Livingston, supra.* The passenger fares from Vancouver and Victoria to Seattle are $4.25 and $2.50, respectively, exclusive of meals and berth, and the rates charged for automobiles are shown by appel-

lant's advertising folders to be from $6.00 to $8.00 from Vancouver, and from $4.00 to $6.00 from Victoria. The testimony at the trial shows that baggage checks for their automobiles are given to passengers having same with them. In addition to passengers and automobiles, these steamers carry mail and some freight between Vancouver and Victoria and Vancouver and Victoria and Seattle. The main part of their business, however, is carrying passengers. The proportion of automobiles carried is one to thirty or forty passengers (p. 4, Brief).

Vancouver is approximately 35 miles *north of the international boundary* between Canada and the United States, and Seattle is about 120 miles *south of* the said boundary. The route followed by the steamers in question does not cross any river or stream forming any part of the said international boundary, but is through the Gulf of Georgia, Straights of Juan De Fuca, Puget Sound, and waters classified by the United States Department of Commerce Pilot Rules as a portion of the high seas.

On page 3 of their Brief counsel attempt to liken the operations of appellant's vessels in question to the services between the mainland and San Juan Island points, between Port Angeles, Washington,

and Victoria, B. C., and between Anacortes, Washington, and Bellingham, Washington, and Sidney, B. C., maintained by the Puget Sound Navigation Company, a Washington corporation. There is no reasonable comparison whatever. The distances traversed by the latter vessels between Port Angeles and Victoria and Bellingham and Sidney are only a fraction of the distances traversed by the appellant's steamers, and the said points are conveniently opposite each other on the shores of the United States and Canada. The said vessels also perform a practically necessary service. The fact, however, that the District Court conceded said routes to be "ferry-lines", in its finding of facts, is not conclusive that they are such *as a matter of law*, as their status as such was not an issue at the trial of this cause, and the court's statement is consequently only *dictum*. The service maintained by appellant's vessels compares much more favorably with that afforded by those plying between Yarmouth and Halifax, N. S., St. Johns, N. B., and Boston and New York, except that the latter are somewhat larger, cover a longer distance, and arrive more infrequently outside of the summer tourist season. These vessels are subject to "overtime" charges whenever they arrive at Boston or New York between 5 p.m. and 8 a.m. (pp. 75, 76, Transcript).

Counsel criticize (pp. 5, 6) the District Court's holding that appellant's steamers in question are not "ferries" on the ground that appellant has no franchise, or license, to operate a ferry within the boundaries of the State of Washington, and cite *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, as authority for such criticism, claiming (p. 6) that, in said case, the Supreme Court held that a state has no power to issue a franchise for international ferries. They also state (pp. 24, 25), after having previously conceded (pp. 23, 24) *that a franchise, or license to operate, is the most essential element in constituting a "ferry"*, that they are entirely at a loss in determining what is an international ferry, inasmuch as there can be no franchise for a ferry operating from one of the United States to Canada, and cite the same case as authority, claiming that it held to that effect. The Court made no such ruling. The decision shows that the International Transit Co. was a foreign corporation having its domicile in Canada, and was engaged in commerce between Canada and the United States; also that *it had a license*, or franchise, from the Canadian Government to operate a ferry between Sault Ste. Marie, Ont. and Sault Ste. Marie, Mich., which prescribed the frequency of the service, the rates to be charged, etc. and provided that

the said company should not infringe on any laws, by-laws or regulations of the United States, the State of Michigan, or the town of Sault Ste. Marie, applicable to said ferry. The sole question before the Court was whether or not, under these circumstances, and under a local ordinance, the said transit company could be compelled to take out a municipal license and pay a license fee to the city of Sault Ste. Marie, Mich. for the privilege of continuing to operate said ferry. The Court held that it could not, and that such matters were within the scope of National, rather than State, legislation. The Court said (p. 342):

> "Assuming that * * * *there exists in the absence of Federal action a local protective power to prevent extortion in the rates charged for ferriage from the shores of the States, and to prescribe reasonable regulations necessary to secure good order and convenience,* we think that the action of the city in the present case in requiring the appellant to take out a license and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the State could exercise either directly or by delegation." (Italics ours).

In *Port Richmond Ferry Co. v. Freeholders of Hudson County*, 234 U. S. 317, also cited by appellant, the Supreme Court said (pp. 321, 328, 332):

> "At common law the right to maintain a public ferry lies in franchise. * * * the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety and convenience of the public. * * * In the absence of action by Congress re interstate ferries, the states have power to regulate. One state, however, cannot derogate from the powers of another state. * * *"

The power of a State extends to regulation of ferries in and into the State, if interstate or foreign commerce is not directly burdened: *St. Claire Co. v. I. S. & C. T. Co.*, 192 U. S. 454. Regulation of operation of international ferries within the State is feasible without violation of international custom or law: *United States v. DeWitt*, 76 U. S. 41 (9 Wall.); nor is the United States concerned with the reasonable regulation of wharves, piers, docks, etc.: *Cannon v. New Orleans*, 87 U. S. 577 (20 Wall.), or establishment of ferries: *Conway v. Taylor's Executors*, 1 Black, 603.

The appellant has no ferry license, or franchise, as required by the laws of the State of Washington (Remington's Revised Statutes of Washington, Vol. 6, Title 32, secs. 5462-5483) and has produced no evidence to show that it has, or ever had, any license

or franchise from the Canadian Government to operate a ferry between Vancouver or Victoria, B.C. and Seattle. The route traversed by appellant's steamers is entirely at variance with the popular conception of a "ferry", and with the definitions of that term above cited. As heretofore stated, its steamers bear no resemblance whatever to the conventional type of "ferry-boat", and they are performing a competitive, rather than a necessary service. They also are required to "enter" and "clear" on each trip which they make to Seattle (See testimony of Oscar W. Damm, Deputy Collector of Customs at Seattle, p. 77, Tr.), while "ferry-boats" are not required to pay clearance fees (R. S. 2792).

Counsel state (p. 4 of their Brief) that the "overtime" law in question was designed to meet the rising demand for overtime immigration inspection service for trans-Atlantic carriers arriving at ports of entry at unanticipated hours, and that the proviso which they cite on page 2 was added to the Act to exempt from its provisions the carriers named when operating on regular schedules over the Canadian border, and (p. 25) contend that Congress could not have intended to embrace in the words "international ferries" the ancient and accepted definition of a "ferry" as a franchise right.

The original design of the bill may be correctly stated, inasmuch as Congressional Record No. 10909, June 16, 1930, shows that same, as it first passed the House of Representatives, contained the following:

> "*Provided*, however, that the provisions of this Act relating to extra compensation shall not apply to international bridges, or to ferries and railroad trains operating on regular schedules."

The report of the Senate Committee on Immigration (No. 1720), which forms a part of "Defendant's Exhibit No. 11", contains the following:

> "The bill as amended in the House limited the application of overtime to ocean ports of entry. Your committee is of the opinion that certain conditions at the international borders are equally meritorious, and has therefore provided that overtime *shall apply to the international boundary as well as to ocean ports, except under the following conditions*:
>
> 'Overtime shall not apply to international ferries, bridges or tunnels.
>
> 'Nor shall aircraft, railroad trains, or *vessels on the Great Lakes and connecting waterways* be subject to assessments for overtime duties performed by immigration employees when they are operating on their regular schedules.
>
> * * * *

'One of the best reasons for favoring this legislation is that for many years the customs employees have had a similar overtime provision to that proposed in this bill, while the immigration officers working side by side with them in the performance of their duties have been, so far, discriminated against.

* * * *

'It is the opinion of the committee that the bill is justified by the principle that the transportation companies should reimburse the Government for special services at unusual hours that advance their own interests. * * * ' " (Italics ours).

The House of Representatives concurred in the Senate amendments and the law was passed in its present form, *supra.* From the foregoing we must conclude that it was designed to apply to the Canadian border and also to place the immigration inspectors and other employees on at least a partial parity with the officers of the Customs Service.

Counsel devote several pages of their Brief to citations of, and quotations from, decisions of the Supreme and other courts respecting the construction of laws, and argue that, under the said decisions, the appellant's vessels are included in those exempted from the operation of this law.

While it is a general rule of law that statutes be strictly construed, it unquestionably is also good law that, when the language of a statute is ambiguous or uncertain, it is open to construction as to its actual meaning and intent. There is nothing ambiguous or uncertain here, however. The classes of carriers exempted from overtime charges are clearly stated. Had Congress had any conception that vessels on the Great Lakes and connecting waterways fell within the category of "international ferries", what was the object of making a specific exception of such vessels under a special classification when provision already had been made for such ferries? The fact that it did so shows conclusively that it had no such conception. How, then, can it be assumed that there was any intention on the part of Congress to exempt the vessels of this appellant, which traverse a much greater distance than most of same, start from a point in Canada approximately 35 miles north of the international boundary, and do not land in the United States until they are more than 100 miles south of said boundary, in the absence of any mention whatever of them in the law? If Congress had any such intention, why did it not say so, as in the case of the Great Lakes steamers? We see nothing in any of

the decisions cited to support appellant's argument.

On pages 20 and 22 of their Brief, counsel submit statements as to the number of passengers carried from Vancouver and Victoria to Seattle during the fiscal year ending June 30, 1932, and the number of passengers carried to Seattle in the first six months of 1932, the amount of revenue derived from such passengers' tickets, and the percentage of "overtime" charges to such revenue and, on page 21, make the statement that 90 per cent of the entire work of the Immigration Service at the port of Seattle for the fiscal year stated was performed in connection with the inspection of its vessels; also that, if the judgment of the District Court is sustained, appellant will be compelled to pay at the high rate of "overtime" pay, for approximately 90 per cent of the immigration inspection work done at the said port, thus apparently attempting to convey the impression that the inspection of its steamers constitutes practically all the work done by the immigration inspectors at that port, when, as a matter of fact, out of approximately twenty such inspectors, all inspection of appellant's steamers is performed by *only two* assigned to said work at any one time, the others being assigned to the inspection of many other arriving steamers and to various other

duties of inspectors. In this connection it may be stated that the account submitted does not appear to show any charges for the inspection of appellant's steamers which arrived at Seattle in the mornings (except a few made for inspection at Vancouver, B. C.), with the exception of those arriving on Sundays and holidays. Consequently, with the exception of such days, and such services at Vancouver, the only "overtime" services for which appellant was charged was the inspection at Seattle of its steamers which arrived about 9 p.m. We are unable to see that the number of passengers carried on appellant's steamers, the revenue derived therefrom, the percentage of same required to pay charges for inspection during overtime hours, or the proportion of appellant's passenger business to the total for the port of Seattle, has any material bearing on the legal aspects of this case.

The United States Government surely cannot be held responsible for the fact that the appellant's evening steamers were, and still are, scheduled to arrive at Seattle during the "overtime" period. The remedy for this situation appears to be in appellant's own hands. It can either bring such steamers into Seattle before the beginning of the said period or can discontinue this part of its service to Seattle, and

land its passengers at some other United States port which conveniently can be reached during the regular inspection period. Such action, no doubt, would be inconvenient, but would be quite possible, and would result in avoidance of the charges to which appellant objects.

On page 19 of their Brief, counsel quote from Department of Labor General Order No. 175, which directs (par. n.) that Commissioners and District Directors of Immigration arrange schedules and working hours of inspectors and other employees of the Immigration Service so as to avoid overtime within said Order, *as far as possible consistent with the due enforcement of the Immigration Law,* etc., and contend that, under said general order, arrangement should have been made for inspection of its steamers without overtime charges. No doubt such an arrangement would have been made by the Commissioner of Immigration at Seattle, pursuant to this order, had it been possible without affecting or altering the length of the regular working day of the inspectors concerned, which is expressly forbidden by section 109a, Title 8 USCA, *supra.* Consequently we must assume that, under the circumstances prevailing during the period involved (no doubt an insuffi-

cient number of inspectors) such arrangement *was not possible* without infraction of said section.

Even were it conceded that appellant's steamers in question constitute an "international ferry", it does not appear that appellant would be exempted from liability to pay overtime charges for the examination and inspection of the *crews* of same, as the exemption in the proviso contained in section 109b, 8 USCA, *supra*, extends only to *passengers*, and it would be physically impossible for the immigration inspectors to go from the Immigration Station to said steamers, make inspection of said crews required by law (see 8 USCA, secs. 151, 152, and Department of Labor General Order No. 133, supra), and get back to the Immigration Station inside of an hour.

It appears that the appellant corporation has been dealt with very leniently by the Immigration Service as to the amount of overtime pay claimed, as, according to the wording of the statute, it appears that such pay could have been claimed for the entire period from 5 p.m. until the inspection was completed, and it was so ruled in the case of the Customs officers in *Ferguson v. Port Huron & Sarnia Ferry Co., supra.*

CONCLUSION

The District Court did not commit error in awarding judgment to the plaintiff in the amount claimed, and said judgment should be *affirmed.*

Respectfully submitted,

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